87-1845

No. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARIANNE RUTLAND CHAISSON,
Petitioner,

vs.

LAWRENCE J. RUTLAND,
Respondent.

On Writ of Certiorari to the Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a child custody proceeding tried to a jury, is the admission of evidence about a parent's minority religion plain error violative of the Free Exercise Clause of the First Amendment when there is no clear and affirmative showing of immediate and substantial harm to the children from the parent's religion?

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Marianne Rutland Chaisson respectfully requests that this Court issue a writ of certiorari to review the judgment of the Texas Supreme Court that left intact the decision of the Dallas Court of Appeals removing Petitioner as managing conservator of the minor children involved herein, and substituting in her place as managing conservator her former husband, Lawrence J. Rutland. The judgment of the Dallas Court of Appeals upheld the judgment of the trial court.

OPINION OF THE COURT BELOW

The opinion of the Dallas Court of Appeals is reported at 729 S.W.2d 923 (Tex. Civ. App. — 1987, writ ref'd n.r.e.). This is the only written opinion issued concerning this case, and is reproduced in the Appendix to this petition.

JURISDICTION

The decision of the Texas Supreme Court denying Petitioner's motion for rehearing was rendered on February 10, 1988. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 14.08, Texas Family Code, "Modification of Order":

> (c) After a hearing, the court may modify an order or portion of a decree that:
>
> (1) designates a managing conservator if:
>
> (A) the circumstances of the child, sole managing conservator, possessory conservator, or other party affected by the order or decree have materially and substantially changed since the date of the rendition of the order or decree to be modified; and
>
> (B) the retention of the present sole managing conservator would be injurious to the welfare of the child; and

(C) the appointment of the new sole managing conservator would be a positive improvement for the child; or

(2) provides for the support of a child if the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the date of its rendition, except that a support order may be modified only as to obligations accruing subsequent to the motion to modify; or

(3) sets the terms and conditions for possession or of access to a child, or prescribes the relative rights, privileges, duties, and powers of conservators if:

(A) the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the date of the rendition of the order or decree; or

(B) the order or portion of the decree to be modified has become unworkable or inappropriate under existing circumstances; or

(C) the notice required by Section 14.031 of this code was not given, or there was a change in a conservator's residence to a place outside the jurisdiction of the court. If a change of residence results in increased expenses for any party having possession of or access to a child, the court may enter appropriate orders to allocate those increased costs on a fair and equitable basis, taking into account the cause of the increased costs and the best interests of the child. Such an order may be entered without regard to whether any other change in the terms and conditions of possession of or access to the child is made; or

(4) designates a managing conservator if the sole managing conservator has voluntarily relinquished possession and control of the child for a period of more than 12 months and the modification is in the best interest of the child; or

(5) designates a managing conservator if a parent of the child requests appointment as a joint managing conservator, and the court finds that:

(A) the circumstances of the child or the sole managing conservator have materially and substantially changed since the entry of the order or decree to be modified;

(B) retention of a sole managing conservatorship would be detrimental to the welfare of the child; and

(C) the appointment of the parent as a joint managing conservator would be a positive improvement for and in the best interest of the child.

STATEMENT OF THE CASE

Petitioner Marianne Rutland Chaisson and Respondent Lawrence J. Rutland were married in April 1975. This seven year union produced two sons, Nicholas, now age nine, and Brian, now eight. At the time of the marriage both parents professed to be of the Roman Catholic faith. Neither of the two boys received training in the Roman Catholic religion during the marriage. In the early part of 1981, Marianne began a course of Bible study offered by Jehovah's Witnesses which resulted in her decision to convert to that religion. This occurred without the consent or approval of her husband Lawrence. Marianne and Lawrence were divorced in Dallas County, Texas, on February 4, 1983. At the time of divorce Marianne and Lawrence agreed that custody of the boys would rest with Marianne. As managing conservator of the two boys Marianne exercised her authority and responsibilities in all matters, including religious training in her new faith.

On February 13, 1984, after Marianne had remarried, Lawrence filed a Motion to Modify in Suit Affecting the Parent-Child Relationship. During the trial of this matter before a jury, Marianne was questioned extensively concerning her religious beliefs and practices as one of Jehovah's Witnesses. The questions set forth in the

Court of Appeals decision reproduced in the appendix are indicative of the religious prejudice that pervaded the trial. Other witnesses, including the husband Lawrence, were questioned about their views concerning Marianne's religious beliefs and practices in comparison to Lawrence's. It was during Lawrence's direct examination that Marianne's trial counsel made her sole objection to this line of questioning:

> Q. If they (the children) were with you, I suppose you would celebrate Christmas and birthdays and that sort of thing?
>
> A. Yes, sir, I certainly would.
>
> Q. That's going to differ greatly.
>
> MS. BARHAM: Your Honor, object to these referenced holidays because I think it has a religious bias.
>
> . . .
>
> THE COURT: What is the grounds of your objection?
>
> MS. BARHAM: Religion.
>
> THE COURT: Overruled.

(SF 280).

Upon the conclusion of this prejudicial inquiry, the jury found that Marianne should be removed as managing conservator and that Lawrence should be made managing conservator in her place. This decision was appealed to the Dallas Court of Appeals which upheld the trial court's decision. The appellate court never reached Marianne's constitutional claims, holding that any error in the admission of testimony about religion was waived by Marianne's counsel's failure to object, and that even if the one objection made was sufficient to apprise the trial court of the nature of her constitutional challenge, any error in overruling the objection was harmless.

Marianne then filed her Application for Writ of Error with the Texas Supreme Court, which denied the application and overruled her Motion for Rehearing on February 10, 1988.

REASONS FOR GRANTING THE WRIT

The determinative issue in this child custody case was the religion of the children's mother, Petitioner Marianne Rutland Chaisson, one of Jehovah's Witnesses. The trial was no more than an inquisition-like examination of the mother's religion before a jury rather than an inquiry into evidence relevant to the best interests of the two minor boys. After hearing this highly prejudicial testimony having nothing to do with the children's best interests, the jury voted to remove the children from the mother's custody. Such majoritarian ridicule of the mother's minority religion so tainted the entire proceeding as to constitute plain error and a denial of fundamental First Amendment rights protected by the Due Process Clause of the Fourteenth Amendment.

The central issue underlying this Petition for Writ of Certiorari is the extent to which the First Amendment religion clauses allow courts to examine and rely on the religious beliefs of divorced parents when making or modifying awards of child custody. For the purposes of this petition, the basic issues are threefold: (1) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody disputes, has decided questions of federal constitutional law in conflict with applicable decisions of this Court; (2) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody disputes, has decided important

questions of federal constitutional law that have not been but should be settled by this Court; or (3) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody, has decided federal constitutional questions in conflict with the decisions of the other state courts of last resort.

I.

The Court Below Has Decided Questions of Federal Constitutional Law in Conflict with the Applicable Decisions of this Court

Marianne was subjected to a thorough examination of the unorthodoxy of her religion. This examination probed into topics such as the celebration of Christmas, flag salute, hellfire, meetings for worship, the trinity doctrine, Armageddon and Halloween. While the trial court has broad discretion to examine all factors which affect the "best interests" of the child, courts have decided questions of federal constitutional law in conflict with the decisions of this Court. Texas procedure is unique among the fifty states in that child custody disputes are decided by juries rather than judges. The danger of prejudice against an unpopular minority is patent when a jury is exposed to extensive testimony about a parent's unorthodox religion in a child custody dispute. The need for highly-sensitive constitutional safeguards cannot be overemphasized in a proceeding as susceptible to majoritarian bias as a jury determination of the "better" way to raise a child.

The federal constitutional questions necessarily decided below were:

(1) Does the Free Exercise Clause of the First Amendment prohibit a trial court from denying custody to a parent

on the basis of the parent's religion when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?

(2) Does the Establishment Clause of the First Amendment prohibit a trial court from making an award of child custody on the basis of religion when the child has no preference for any religion?

The Free Exercise and Establishment Clauses of the First Amendment protect the individual's right to worship in accordance with his religious beliefs. While religious free exercise is a fundamental right, it is not absolute and, when faced with the state's compelling interest in the "best interests" of the child, may be restricted for the child's protection. *Wisconsin v. Yoder,* 406 U.S. 205, 216-19 (1972). However, whenever a conflict between the parent's fundamental rights and the child's best interest arises, the state's intervention must be tailored to achieve the "least restrictive means" necessary to protect the state's interest. *Sherbert v. Verner,* 374 U.S. 398, 406 (1963).

In addition, the Establishment Clause of the First Amendment prohibits the state from establishing or supporting a religion. The tripartite test presented in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, (1971), requires: (1) that the state's action have a secular purpose; (2) that its principal or primary effect neither advance nor inhibit religion, and (3) that it not foster an excessive entanglement with religion. This standard has been applied in child custody matters. (See *Zucco v. Garrett,* 150 Ill. App. 3d 146, 501 N.E.2d 875 (1986); *Sanborn v. Sanborn,* 123 N.H. 740, __, 465 A.2d 888, 894 (1983); *Bonjour v. Bonjour,* 592 P.2d 1233, 1242-44 (Alaska 1979); *Waites v. Waites,* 567 S.W.2d 326, 332-33 (Mo. 1978).) Unless the

minor children indicate a preference for a particular religion, award of custody based on religion or curtailment of religious practices is an unreasonable infringement on rights protected by the Establishment Clause.

While matters involving child custody traditionally have been left to state procedural and substantive rules, *Lehman v. Lycoming County Children's Services Agency,* 458 U.S. 502 (1982) this case presents a situation which merits determination under federal constitutional standards. Texas procedure providing jury trials in custody cases makes child custody decisions in Texas much more susceptible to majority bias than the court decided custody decisions of other states. The jury setting opens the way to the imposition of majoritarian standards in child rearing regardless of evidence truly bearing on the child's best interests. The greater risk of majoritarian bias requires more stringent control and directives by the court in order to safeguard both the state's interest in the welfare of the child and the parent's fundamental right to practice his or her religion.

The Constitution necessarily requires consistency in applying the protections of the Free Exercise and Establishment Clauses of the First Amendment in child custody cases. The importance of uniform, constitutionally sensitive procedures for making custody determinations when issues of religion are raised is heightened when juries are given the decision-making responsibility. Without the establishment of constitutionally sensitive procedures, the jury's verdict will become a popularity poll in which the parent who professes a "minority" religion will always be at a disadvantage.

Admission of testimony concerning religious beliefs and practices may be necessary when there is a direct connection to the state's interest in determining if the practices have resulted in a clear and affirmative showing of harm to the minor children.

The Supreme Court in Maine has employed a two-step procedure which provides sufficient protection for both the state's interest in the welfare of the child and the parent's rights to practice his or her religion freely without undue intervention from the state.

> Therefore, in approaching a case of this sort the divorce court should make a preliminary determination of the child's best interest, *without giving any consideration to either parent's religious practices,* in order to ascertain which of them is the preferred custodial parent. Where that preliminary determination discloses that the religious practices of only the *nonpreferred* parent are at issue, any need for the court to delve into a constitutionally sensitive area is avoided. If, on the other hand, that preliminary determination discloses a preference for the parent whose religious practices have been placed in issue, the divorce court, in fashioning an appropriate custody order, may take into account the *consequences upon the child* of that parent's religious practices. Because of the sensitivity of the constitutional rights involved, however, any [religious] inquiry must proceed along a two-stage analysis designed to protect those rights against unwarranted infringement. To summarize that analysis briefly: first, in order to assure itself that there exists a factual situation necessitating such infringement, the court must make a threshold factual determination that the child's temporal well-being is immediately and substantially endangered by the religious practice in question and, if that threshold determination is made, second, the court must engage in a deliberate and articulated balancing of the conflicting interests involved, to the end that its custody order makes the least possible infringement upon the parent's liberty interests con-

> sistent with the child's well-being. In carrying out that two-stage analysis, the trial court should make, on the basis of record evidence, specific findings of fact concerning its evaluation of all relevant considerations bearing upon its ultimate custody order.

Osier v. Osier, 410 A.2d 1027, 1029-1030 (Me. 1980).

There is need for direction on the balancing of the interests presented by the Free Exercise and Establishment Clauses of the First Amendment and the "best interests" standard governing child custody cases.

II.

The Court Below Has Decided Important Questions of Federal Constitutional Law That Have Not Been But Should Be Settled By This Court

Testimony concerning a parent's religious beliefs and practices may be necessary to determine the "best interests" of the child. However, when such evidence has at best an attenuated connection to the state's interest in the child's welfare, such evidence opens the way to a popularity vote of the parent's religion. Such testimony under these circumstances amounts to "plain error" that irrefutably denied a parent an impartial assessment of her abilities as custodial parent.

The "plain error" doctrine requires rehearing when child custody is modified by a jury trial decision wherein the jury is permitted to hear and consider substantial testimony about the teachings and beliefs of a parent's minority religion and when that testimony is not offered to prove that the religious teachings and practices have caused substantial harm to the minor children, is obvious. Although the "plain error" doctrine is codified in the Federal Rules of Criminal Procedure, Rule 52(b), the

underlying principle "merely restates existing law" and the principle should apply in this unique situation. *See United States v. Frady,* 456 U.S. 152, 163 (1982). The "plain error" doctrine empowers an appellate court to correct a lower court's judgment when affirmation of the judgment would allow grave error which seriously affects substantial rights to go uncorrected.

When a jury is allowed to pass judgment on the advantages and disadvantages of a parent's unorthodox, unpopular minority religion, such a proceeding makes a mockery of what is just and impartial and results in not only a personal loss to the party, but "seriously affect[s] the fairness, integrity, [and] public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160 (1936).

This United States Supreme Court has never addressed the question of plain error allowing for religious prejudice in the setting of a child custody dispute tried to a jury. This danger of jury prejudice is difficult, if not impossible, to avoid on appeal because of the broad discretion and deference afforded trial courts in their custody determinations. Unless the trial court has abused its broad discretion the reviewing court will not upset the custody decree. Such a low threshold of appellate review ignores the reality of jury bias against a parent because of her unpopular, minority religion and deserves the important constitutional interests in need of protection. A custody determination procedure that so readily allows the violation of fundamental rights of members of religious minorities for no compelling state interest demands this Court's attention.

III.

State Courts of Last Resort Are in Conflict Over the First Amendment Limitations on the Role of Religion in Child Custody Disputes

The Texas Supreme Court has decided questions of federal constitutional law in conflict with the decisions of other courts of last resort. The federal constitutional questions necessarily decided in *Rutland* were:

> (1) Does the Free Exercise Clause of the First Amendment prohibit a fact finder from denying custody to a parent on the basis of that parent's religion when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?
>
> (2) Does the Establishment Clause of the First Amendment prohibit a fact finder from making an award of child custody on the basis of religion when the child has no preference for any religion?

The Texas Supreme Court's affirmation of the decision denying custody on the basis of one parent's religion when there has been no clear and affirmative evidence of immediate and substantial harm to the child conflicts with the First Amendment free exercise protection construed by the other state courts of last resort. *Osier v. Osier,* 410 A.2d 1027, 1030-31 (Me. 1980); *Hanson v. Hanson,* 404 N.W.2d 460, 463-64 (N.D. 1987); *Munoz v. Munoz,* 79 Wash. 2d 810, 813-15, 489 P.2d 1133, 1135 (1971); *see also Mentry v. Mentry,* 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983); *In re Marriage of Hadeen,* 27 Wash. App. 566, 619 P.2d 374 (1980).

Moreover, this affirmation conflicts with Establishment Clause limitations construed by other state courts of last resort. *Bonjour v. Bonjour,* 592 P.2d 1233, 1241-44 (Alaska 1979); *Sanborn v. Sanborn,* 123 N.H. 740, 747-49,

465 A.2d 888, 893-94 (1983); *see also Zucco v. Garrett,* 150 Ill. App. 3d 146, __, 501 N.E.2d 875, 880 (1986).

These inconsistencies in application of fundamental constitutional rights result in infringement of freedoms guaranteed to all people, particularly to those who are members of unpopular minorities. The conflicting, inconsistent results achieved by the state courts in their construction of the Federal Constitution's Religion Clauses in child custody cases can only be set straight by this Court.

CONCLUSION

Members of unpopular religious minorities are entitled to the full protection of the First Amendment. To assure them this protection requires trial courts to affirmatively exert control over the proceedings to minimize the influence of religious prejudice. State courts need guidance from this Court as to the limits on the admission of evidence concerning a parent's religious beliefs and practices. Without a binding, authoritative statement of the appropriate federal constitutional analysis of the First Amendment issues raised in this case, established, the problems typified by this case and the questions raised in this petition will come back to this Court again and again.

Respectfully submitted,

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COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00510-CV

[729 S.W.2d 923]

IN THE MATTER OF THE MARRIAGE OF MARIANNE RUTLAND AND LAWRENCE J. RUTLAND AND IN THE INTEREST OF NICHOLAS J. RUTLAND AND BRIAN ANDREW RUTLAND, MINOR CHILDREN.

From a District Court of Dallas County, Texas.

BEFORE JUSTICES WHITHAM, BAKER AND LAGARDE
OPINION BY JUSTICE WHITHAM
APRIL 1, 1987

In this child custody case, the appellant-mother, Marianne Rutland Chaisson, appeals from the trial court's order granting the appellee-father's, Lawrence J. Rutland, motion to modify in a suit affecting the parent-child relationship. The order removed Marianne as managing conservator of the parties' two sons, ages five and six, and appointed Lawrence as managing conservator. Marianne contends that testimony regarding her religious beliefs and practices as a member of Jehovah's Witnesses violated her rights under the First Amendment of the United States Constitution and article I, section six of the Texas Constitution and that such evidence was incompetent. She further contends that the evidence is legally and factually insufficient to support the jury's finding that retention of her as managing conservator would be injurious to the children. She fur-

ther contends that the evidence is legally and factually insufficient to support the jury's finding that appointment of Lawrence would be a positive improvement for the children. She also contends that the trial court erred in denying her motion for new trial and motion for judgment notwithstanding the verdict. We conclude that, because Marianne failed to object to the evidence regarding her religious beliefs and practices, she waived any error regarding admission of that evidence. We further conclude that the evidence is legally and factually sufficient to support the complained-of jury findings and that the trial court correctly denied Marianne's motion for new trial and motion for judgment notwithstanding the verdict. Accordingly, we affirm.

In her first point of error, Marianne contends that the trial court's judgment should be reversed because the testimony regarding her religious practices was incompetent evidence and allowing such testimony was an abridgement of her rights under the First Amendment to the United States Constitution and Article I, section six of the Texas Constitution. In her brief, Marianne insists that the following questions and her answers deprived her of her rights under both constitutions:

> Q. Now, during Christmas - you don't celebrate Christmas, do you?
>
> A. No, sir, I don't.
>
> Q. Why not?
>
> . . . .
>
> A. Christmas comes from Saturnalia which is pagan.
>
> Q. So we can shorten it, then, and say it is pagan ritual?
>
> A. If you would like to.
>
> . . . .

Q. You don't celebrate birthdays, either, do you?

A. No.

Q. Why not?

A. Because of the ones that have been recorded in the Bible, the birthday of pharaoh and the birthday of Herod, the one who had all the babies killed - Herod had John the Baptist beheaded on his birthday. Pharaoh had his baker hung on his birthday, and being that the only two birthday celebrations are recorded in the Bible and since those birthdays were enjoyed by only pagans, to me and to Jehovah's Witnesses it is evidence that Jehovah God does not approve of birthday celebrations.

Q. So I guess what we could say now is that if Nicholas were to celebrate his birthday with his father, his natural father, Larry, it would be involved in a pegan [sic] ritual? Is that a fair statement?

A. Its — I guess. I'd say that's fair.

• • • •

Q. Are you concerned about how these two children might react when you take something that their daddy has given them and throw it away? Does that concern you ma'am?

A. If I were to throw something away they would have been given a reason. They know I don't allow military toys in the house.

Q. Why don't you?

A. Because it is against scriptural principles.

Q. How about that flag? What if Larry gave them that flag, do you have that in the house, that American flag right behind you?

A. I couldn't say. He's never sent them one.

Q. Well let's hypothesize. Could they have that?

A. I'd have to give it some serious thought.

Q. I want you to tell this Jury what you have told to 5 and 6 year old children of yours what would happen if they went to live with their daddy.

A. That if they went to live with their daddy, he could provide very abundantly in a material way, but as far as spiritual things, there wouldn't be that much. However, if they were to stay with us, and I'm speaking of by choice, if they were to stay with us, then we cannot provide as much as Mr. Rutland can, however, we can provide abundantly in a spiritual way and they stand a good chance of passing through Armageddon and living forever in a paradise.

. . . .

Q. You're telling your natural children, this man's children, that if they go live with him they are going to go to hell?

A. No sir.

Q. Well, what did you just tell this jury what you're telling them then?

A. I said if they go by choice and want to live with a man who does not serve Jehovah, then.

Q. They are going to hell?

A. Then Jehovah can hold them accountable.

Q. That's not what you said Mrs. Chaisson.

A. That's what I mean, Mr. Irwin.

. . . .

A. I can recall [putting hot pepper juice on the children's tongues] doing Nicholas one time because he lied and Brian maybe twice, maybe three times. I don't recall.

Q. Now, listen to me very carefully. Have you ever told the children — let's just break it up. Have you ever told the children that you'll put hot peppers on their mouth if they prayed to daddy's God?

A. No, sir. I cannot make my children serve Jehovah.

. . . .

Q. Are the children allowed to participate in any extracurricular activities?

A. Not at this time.

Q. Why not?

A. We devote time to more important things.

Q. I think that's where we left off a moment ago. What is more important?

A. Certainly preparing for the meetings we have.

Q. What meetings?

A. The meetings at the Kingdom Hall of Jehovah's Witnesses. I'm speaking of spiritual things.

Q. How often do they have to prepare for that?

A. We have three meetings, three different times a week, excuse me.

• • • •

Q. Well, would you let them play in the band?

A. Well, perhaps. If I felt it was not taking away from their school work or spiritual activities.

Q. Well, if they played in the band and it came time to play "God Bless America", would you let them do it?

A. They would be silent.

Q. I'm sorry. They would be what?

A. Silent. I have no objections to bands.

Q. What do you mean they would be silent?

A. They would not participate in the song.

Q. Why not?

A. It is a patriotic song.

Q. What's wrong with that?

A. We are not patriotic.

• • • •

Q. What is the most important thing in your life, Mrs. Chaisson?

A. I would say my service to Jehovah.

Q. Even if that is detrimental to your children?

A. It is not detrimental.

• • • •

Q. Well, they know, when the two children receive presents from their father and you're teaching them that if they worship in the way that their father does and if they celebrate Christmas and birthdays and if they're patriotic and all those things that you don't agree with religiously, isn't that teaching the children through their emotions that any relationship they have with their father is a demon-type relationship, and therefore, repulsive?

* * * *

Q. Have you ever discussed with your children—well, you said yesterday that you had, discussed with your children the saying of prayers when they're with their daddy. You recall us talking about that yesterday, don't you?

A. I don't recall. I'm not sure.

Q. Well, have you discussed with your children the saying of prayers when they're with their father?

A. Yes.

Q. Tell the Jury what you said about telling them that?

A. Well they - their father does not pray to Jehovah, so pray to -

Q. Who is Jehovah?

A. Jehovah is God.

Q. Who are you telling your children when they visit with their daddy who they're praying to, then?

A. The Trinity, that's who they pray to.

Q. And that's - is that repulsive?

A. To pray to a false God is repulsive, yes.

Q. So, you teach your children that if they go visit their daddy and pray that something they're doing is repulsive; is that right?

A. Not exactly.

Q. Well, what exactly is right?

A. I teach them to pray to Jehovah is what is pleasing to Jehovah. To pray to another God is not pleasing to Jehovah, that they can still pray to Jehovah no matter where they are.

Q. Well, don't you think, Mrs. Chaisson, that when you tell your children these kind of things when they come back from being with their daddy, that that's causing them some emotional turmoil within themselves?

A. I don't believe so.

Q. You don't think so?

A. No, sir.

Q. Because you don't think so, Mrs. Chaisson, you're going to continue to teach them just as you have been since your marriage to Mr. Chaisson, aren't you?

A. I don't intend to change my teachings about Jehovah.

Q. And how it affects your children and their relationship with their natural father emotionally is of no concern to you, is it?

A. My children's emotional welfare is of concern to me.

• • • •

A. Well, Mr. Irwin, you're not bringing out the fact that a parent has the responsibility to teach their children the truth, and considering myself Christian, I take seriously that responsibility, so we teach them what the Bible says, that there is only one true God and to worship anyone else would be doing yourself and God a disservice.

So I am one of Jehovah's Witnesses because I believe I have the truth (sic) faith, and to teach someone that it would be okay to engage in things that are unscriptural, I would be a hypocrite and I cannot do that. We encourage the children, you know, to tell your daddy what you've learned, tell him about the paradise after Armageddon, tell him — be obedient to him, that you are required to be obedient to your parents except when they, what - what we require conflicts with God's law if they are obedient to him.

They are well-behaved children, they love their daddy, and they know we expect them to behave themselves over there. We expect them to tell the truth no matter what the consequences might be to the best of their ability. We have a very loving environment, but we have not discouraged love for their father. We've not told them, as you have stated on

several occasions, we have not told them that to go over to their father's house they would die.

Armageddon does not mean the end of the world, as you have said, and hell is not a burning place of torment, as I am assuming many people believe, so when we speak of hell, when we speak of Armageddon, these aren't frightening things to them. They know that Armageddon is not aimed at those serving Jehovah but those who are wicked, so they know that they are not going to be the object of Jehovah's war if they remain faithful to Jehovah.

But being youngsters, I don't know at what age Jehovah will hold them accountable. It's between them and Jehovah, I cannot force them serve any god. I can just train them with what I know, with the Bible, and with what I have and that's the best that I can do. We teach them that you need to love your father. Perhaps if you would tell your father about paradise, maybe he would understand what it is, you know, that we're teaching, that after Armageddon, it doesn't mean destruction of the earth, it means a paradise of the earth according to what the Bible says, so what we're teaching them is not frightening. Instead it is something to look forward to and we put in terms they can understand and no matter how young they are they're not too young to know the difference between right and wrong, the difference in telling the truth and telling an untruth.

In her brief, Marianne insists that the following questions and Lawrence's answers deprived her of her rights under both constitutions:

Q. Did you talk to the children about Christmas this year?

A. Yes, we did.

Q. What did they tell you?

A. We started talking about making a list for Santa Claus and talking about putting up a Christmas tree and things like that, Christmas presents and they just both looked at me and Nicholas looked at me and said they didn't want any Christmas presents and they didn't want anything to do with a Christmas tree and that they didn't want to celebrate Christmas and -

Q. Did you take them to church Sunday when you had them?

A. Yes, we did.

Q. Did you discuss going to church with them?

A. I certainly did.

Q. Did they intimate any fears to you, and if so, what were they?

A. They both were very nervous when I was - after I gave them a bath and was putting clothes on them. And it was a look I really - I just had not seen on either of their faces before. They said that mommy had told them that if they go to my church, that they won't survive Armageddon and that, I would go downstairs.

. . . .

Q. If they [the children] were with you, I suppose you would celebrate Christmas and birthdays and that sort of thing?

A. Yes, sir, I certainly would.

Q. That's going to differ greatly.

[Marianne's Attorney]: Your Honor, object to these referenced holidays because I think it has a religious bias.

THE COURT: What is the grounds of your objection?

[Marianne's Attorney]: Religion.

THE COURT: Overruled.

. . . .

Q. Now, I believe you previously mentioned, your feelings about where you viewpoint on Marianne's religious beliefs.

A. Yes, I have.

Q. And what are those viewpoints again?

A. I don't like it. I'm very unhappy as to what it's doing to my children and the effects it's having on them.

In her brief, Marianne insists that the following questions and a psychologist's answers deprived her of her rights under both constitutions:

Q. Now, considering emotional blackmail and knowing what is good in your expert opinion for children and so forth which you've been shown to be qualified as being . . . how do you feel about someone who would tell their children that if you go live with your father, you're not going to survive Armageddon and go to paradise, but you've got to come and stay with me in order to go paradise? Do you think that's -

A. I think -

Q. Let me finish the question. Do you think that's appropriate behavior for an adult to tell their children?

A. I think if that was their religious views it would be.

Q. You think that's appropriate?

A. It wouldn't be my views.

Q. I'm not asking about views, Dr. Price. I'm asking you if you think that's an appropriate behavior?

A. For a person who has a certain belief, yes, I would. For someone who didn't have a certain belief, no.

. . . .

In her brief, Marianne insists that the following questions and one of the children's schoolteacher's answers deprived her of her rights under both constitutions:

Q. So I'm not going to go into that with you. I think we're all glad that he is. Just as a point of interest though, on Halloween do y'all have a kind of a — I remember when I was in school we had kind of a Halloween party there in class . . . Do you still do that?

A. We have activities that, you know, we correlate into our class work that are fun activities for them, and then they do have a party on that day itself.

. . . .

Q. All right. Is the party in a — in the middle of the day or morning or afternoon?

A. It is scheduled to be the last period of the day.

Q. I'm just interested in knowing what does Nicholas do during that party, or what did he do?

A. His mother came and picked him up from school.

Q. Took him out of there so he was not allowed to participate in the party?

A. Yes, sir.

Q. So whether or not, you know, being taken away from that makes him sad or not, you wouldn't know because he wasn't there?

A. Yes sir.

• • • •

Q. And also when I was in school we use to have — of course, I don't know if they do this anymore or not, but we used to say the pledge of allegiance. Do ya'll do that any more or is that against the law?

A. We do but we do not do it everyday. In our building it does not come up through an intercom system. It's up to each teacher to do it at her discretion.

• • • •

Q. Good for you. So it's not totally against the law to do that?

A. We are able to do so.

Q. Does Nicholas say the pledge of allegiance?

A. No, sir.

Q. Why not?

A. As I understand, this is part of their belief that they do not salute the flag.

Q. What does he do? Is that when he just says at his desk?

A. He just stands there by his desk. Generally, when I do it, it would be just before the children got ready to go home and they would have, you know, all of their things ready to go home and we would just stand up and say the pledge just before going home.

Q. Do you know how he feels about that?

A. I've never talked to him about it.

Q. Just as you never talk to him about leaving when he can't stay at the parties?

• • • •

Q. Now, Christmas is coming up. Again, when I was in school we had kind of a Christmas party where people exchanged gifts. Do y'all still do that?

A. Yes, sir.

Q. Make something at home?

A. I don't remember how we do it.

Q. Do you make something, buy something or how does that go?

A. I am sending home a note that will ask them to buy a gift between $1.50 and $2.00.

Q. Are you going to send a note home with Nicholas?

A. There is some other information on the note so it will go home.

Q. What would happen? You don't know I don't guess, or do you know what's going to happen when that party comes around?

A. I can only assume he won't attend.

Q. So he won't receive a gift with the other children?

A. No, sir.

• • • •

In her brief, Marianne insists that the following questions and her mother's answers deprived her of her rights under both constitutions:

Q. What are you going to — well, I really just have one other question for you. If Larry were telling your grandchildren that if they went to live with your daughter they would go to hell, how would you feel about that?

A. I wouldn't feel very good about that.

Q. Would you think that's a horrible thing to say to your grandchildren?

A. I think there are ways of saying things that might not be horrible.

Q. Well, saying it that way, would you think that would be a horrible thing to say to a six and five year old?

A. Yes.

Q. Would you think it would be damaging to them?

A. I'm not sure that the children would fully understand the implication of the words.

• • • •

Q. All right. Would it surprise you to learn that your daughter has admitted saying the same thing except in reverse? Would that surprise you?

A. Well, no it wouldn't surprise me.

Q. Well, you just testified a moment ago that you thought she was - went through a long, I think, 3 or 4 minutes about that she was wonderful, caring, a great mother and everything else. Why wouldn't that surprise you that she would say such a thing?

A. Because it's a — what they believe, and —

Q. Who is they?

A. The Jehovah's Witnesses.

Q. And so if they believe it — well —

A. I believe that the way she treats them and loves them and raises them will overcome everything. I believe in time they will understand and they really believe that she's their mother, and if she tells them that it is her privilege. I don't agree with it.

For the purposes of this opinion, we assume, but do not decide, that all of these questions and answers concern Marianne's religious beliefs and practices. Nevertheless, other than the objection "religious bias" directed to a question put to Lawrence as set forth above, which was made near the end of the three day trial, Marianne failed to object to any of the questions and testimony

concerning her religious beliefs and practices on the ground that it violated her constitutional rights. Marianne contends, however, that because the evidence regarding her religious beliefs and practices violated her rights under the First Amendment of the United States Constitution and article I, section six of the Texas Constitution, error in the admission of such testimony was fundamental.

Recently, the Amarillo Court of Appeals addressed this issue. In *Knighton v. Knighton,* No. 07-85-0337-CV (Tex. App.—Amarillo, Jan. 8, 1987, no writ) (not yet reported), the court held that, because evidence regarding the mother's religious beliefs admitted in a child custody case was of constitutional dimension, error was not waived by failure to object to the testimony. *Knighton,* Slip Op. at 20 ("[t]he error, therefore, being of constitutional dimension, is fundamental"). In addition, the court held that the mother's withdrawal of her motion for mistrial, after the trial court indicated that it would be granted, did not waive error in the admission of evidence concerning the mother's religious beliefs. The court stated:

> If the interest of [the mother] alone was involved in this case, [the father's] waiver argument would be compelling, since, if the court's offer of a mistrial had been accepted, it would have given [the mother] the relief from earlier error, which at the time she thought egregious enough to require mistrial. However, in a case involving the custody of a child or children, the interests of the State are involved since it is its duty as a sovereign to look after, and protect, the welfare of children located within its boundaries. *Wicks v. Cox,* 146 Tex. 489, 208 S.W.2d 876, 878 (1948); *Woodard v. Texas Dept. of Human Resources,* 573 S.W.2d 596, 597 (Tex.Civ. App. —Amarillo 1978, writ ref'd n.r.e.); *Hollis v. Hollis,* 508 S.W.2d 179, 182 (Tex.Civ. App.—Amarillo 1974, no writ). No

> action of, or failure to take action by [the mother] could waive that State interest. (Footnote 1)

Knighton, Slip Op. at 24.

We decline to follow the holding in *Knighton* that error of constitutional dimension is fundamental. It is well-settled that failure to object to the introduction of evidence waives any error. *Stonecipher v. Butts,* 686 S.W.2d 101, 103 (Tex. 1985). It is equally well-settled that even constitutional errors may be waived by the failure to object. *In re M.A.B.,* 641 S.W.2d 621, 623 (Tex. App.—Corpus Christi 1982, no writ); *Phillips v. Phillips,* 532 S.W.2d 161, 163 (Tex. Civ. App.—Austin 1976, no writ). Consequently, we conclude that error, if any, in the admission of evidence regarding Marianne's religious beliefs and practices was not fundamental merely because it may have violated Marianne's rights under the First Amendment of the United States Constitution and article I, section six of the Texas Constitution.

We likewise decline to follow the statement in *Knighton* that, because of the State's interest in the welfare of children within its boundaries, error could not have been waived by the failure to object. Fundamental error survives today only in those rare instances in which the record shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes and constitution of this state. *Cox v. Johnson,* 638 S.W.2d 867, 868 (Tex. 1982); *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1982). While it is true that the State has an interest in the welfare of children within its boundaries, just as it has an interest in the welfare of all citizens within its boundaries, we fail to see how the State has

a direct interest in the conservatorship of the children at issue in the present case, nor can we see how any interest of the State has been adversely affected by naming Lawrence, rather than Marianne, as managing conservator of the children. Thus, we conclude that the State's general interest in the welfare of its citizens cannot form the basis for holding that error cannot be waived by a party to the suit. (Footnote 2) To hold otherwise would be "to embrace [the argument's] logical extension that in an appeal from a conservatorship determination, the aggrieved part[y] is entitled to ignore all procedural requirements of the predicate for and the assignment of error, and have the best interest of a child reviewed as a matter of unassigned fundamental error founded on the State's interest." *Knighton,* Slip Op. at 6 (Reynolds, C.J., dissenting). Thus, we hold that error, if any, in the admission of testimony regarding Marianne's religious beliefs and practices was not fundamental merely because the State has an interest in promoting the welfare of children within its boundaries.

Accordingly, we hold that, by failing to object, Marianne waived any error in the admission of evidence regarding her religious beliefs and practices.

Regarding the one instance in which Marianne objected to a question on the ground of "religious bias," we assume, but do not decide, that the question was indirectly related to Marianne's religious beliefs and practices. Nevertheless, we hold that, even if the objection was sufficient to apprise the trial court of the nature of her complaint, error, if any, in overruling the objection was harmless. In light of the extensive unobjected-to testimony regarding Marianne's religious beliefs and

practices, we hold that the failure to sustain her objection to one question was not such a denial of Marianne's rights as was reasonably calculated to cause, and probably did cause, the rendition of an improper verdict. See TEX. R. APP. P. 81(b)(1). Accordingly, we overrule Marianne's first point of error.

In her next two points of error, Marianne contends that there is no evidence, and that the evidence is factually insufficient, to support the jury's answer to special issue number two. Marianne contends that the testimony regarding her religious beliefs and practices was incompetent evidence and that such evidence cannot be considered in a review of the legal and factual sufficiency of the evidence. Consequently, she contends that if this evidence is excluded, there is no evidence, or there is factually insufficient evidence, to support the jury's answer to special issue number two.

We agree that incompetent evidence, even if unobjected to at trial, may not be considered in determining the legal and factual sufficiency of the evidence. *Engineered Plastics Inc. v. Woolbright,* 533 S.W.2d 906, 909 (Tex. Civ. App.—Tyler 1976, no writ); see *Texas Department of Public Safety v. Nesmith,* 559 S.W.2d 443, 447 (Tex. Civ. App.— Corpus Christi 1977, no writ). We conclude, however, that we need not address the question of whether the testimony regarding Marianne's religious beliefs and practices was incompetent evidence, because we conclude that, even excluding such testimony, the remaining evidence is legally and factually sufficient to support the jury's answer to special issue number two.

Special issue number two asked:

> Do you find from a preponderance of the evidence that

the retention of MARIANNE CHAISSON as managing conservator would be injurious to the welfare of the children?

Answer: "We do" or "We do not."

Answer: We do.

See TEX. FAM. CODE ANN. Section 14.08(c)(1)(B) (Vernon 1986).

The "injurious retention" test focuses upon the circumstances of the present managing conservator to determine if retaining the child in the custody of that managing conservator would be injurious to the child's present and future welfare. *See e.g., Ogrydziak v. Ogrydziak,* 614 S.W.2d 474, 477-78 (Tex. Civ. App.—El Paso 1981, no writ); see also 4 B. KAZAN, FAMILY LAW, TEXAS PRACTICE AND PROCEDURE Section 80.03[2][c] (1986). The possessory conservator's circumstances have no direct bearing upon the injurious retention inquiry. *See Jones v. Cable,* 626 S.W.2d 734 736 (Tex. 1981); *In re Y,* 516 S.W.2d 199, 203 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). Consequently, in considering points of error two and three, we will consider only the circumstances of Marianne to determine whether there is no evidence, or whether the evidence is insufficient, to support the jury's finding in response to special issue number two.

In her second point of error, Marianne contends that there is no evidence to support the jury's answer to special issue number two. In reviewing a no evidence point of error, this court must consider only the evidence and inferences tending to support the jury verdict and disregard all evidence and inferences to the contrary. *Garza v. Alviar,* 395 S.W.2d 821, 833 (Tex. 1965); *In re King's Estate,* 150 Tex. 662, 664, 244 S.W.2d 660, 661

(Tex. 1951). In the present case, the evidence reflected that Marianne had remarried since her divorce and that her husband was "in charge of everything" in the household. Marianne testified that the children were spanked with a belt and a paint stick and she conceded that "once or twice . . . maybe three times," the spankings left bruises and welts on the children. She agreed that she "had a concern" that her husband sometimes got "carried away" in disciplining the children. She also testified that she had put hot pepper juice on the children's tongues to punish them.

Lawrence testified that in September of 1983, he returned from a trip overseas and learned that Marianne had moved away with the children. He was unable to locate them until "approximately the third week of October," when Marianne sent him a letter informing him of her new address. Lawrence also testified that the children began calling him "Larry" and Marianne testified that she instructed the children to call her new husband "sir" or "daddy." Lawrence testified that when he asked Marianne why the children called him "Larry", Marianne "reiterated that she was remarried, they had a good family, and the boys had a new family, and I was not a part of it."

A court appointed psychologist, who examined Marianne, Lawrence, and the children, testified that one of the children was not permitted to display Lawrence's photograph in his room. The psychologist testified that "I spoke to [Marianne] about this. She was very angry and said that 'Larry does not deserve to be in my house, in my husband's house, or in my children's house.'" He also testified that "the children are made to call [Mar-

ianne's new husband] 'Daddy' and that "they are spanked if they do not call [him] 'Daddy.'" The psychologist further testified that the children "verbalized considerable apprehension and fear that they would be spanked" and that Marianne did not believe the fear existed. The psychologist characterized the children's behavior with their mother as "pretty stiff, nonspontaneous, almost . . . like little robots." He recommended that Lawrence be named managing conservator of the children.

We hold that this evidence is some evidence from which the jury could conclude that retention of Marianne would be injurious to the welfare of the children. Accordingly, we overrule Marianne's second point of error.

In her third point of error, Marianne contends that the evidence is factually insufficient to support the jury's answer to special issue number two. In reviewing the factual sufficiency of the evidence to support the jury's answer to a special issue, this court must review all the evidence and, if the evidence is insufficient to support the jury's answer, must set aside the judgment and remand the cause to the trial court for a new trial. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Garza*, 395 S.W.2d at 823.

In addition to the evidence cited above, the following evidence was presented at trial. Marianne testified that the children were happy and emotionally stable. She stated that her husband had taken the children camping, hiking, and swimming and that he played games with the children. The children's schoolteachers testified that the children were well-behaved and earned good grades. Both teachers testified that neither of the children "behaved like robots." A psychologist retained by Marianne

testified that Marianne showed "strong feelings of love and concern for her children." He testified that he had extensive experience dealing with physically and sexually abused children and that neither child exhibited symptoms of physical abuse. He further testified that neither child spontaneously mentioned spankings to him and that he saw no signs of fear of their stepfather. The psychologist testified, however, that because he had not examined Lawrence, he was unable to recommend which parent should be managing conservator of the children.

Although there was conflicting evidence regarding whether retention of Marianne as managing conservator would be injurious to the welfare of the children, the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *First City Bank-Farmers Branch v. Guex,* 659 S.W.2d 734, 739 (Tex. App.—Dallas 1983) aff'd 677 S.W.2d 25 (Tex. 1984). Thus, the jury was free to believe the testimony of Lawrence and the court appointed psychologist tending to show that retention of Marianne as managing conservator would be injurious to the welfare of the children and to disbelieve the contrary evidence tending to show that retention of Marianne as managing conservator would not be injurious to the welfare of the children. Consequently, we hold that the evidence is factually sufficient to support the jury's answer to special issue number two. We overrule Marianne's third point of error.

In her fourth and fifth points of error, Marianne contends that there is no evidence, and that the evidence is factually insufficient, to support the jury's answer to special issue number three. That special issue asked:

> Do you find from a preponderance of the evidence that

the appointment if LAWRENCE J.RUTLAND as the new managing conservator would be a positive improvement for the children?

ANSWER: "We do" or "We do not."

ANSWER: We do.

See TEX. FAM. CODE ANN. Section 14.08(c)(1)(C) (Vernon 1986).

The "positive improvement" test focuses on the circumstances of the possessory conservator to determine if his appointment as the child's new managing conservator would be a positive improvement for the child's present and future well being. *See Jones,* 626 S.W.2d at 736; *In re Y,* 516 S.W.2d at 203. *See also,* 4 B. KAZEN, *supra,* Section 80.03[2][d]. Thus, in considering points of error four and five we must consider only the circumstances of Lawrence to determine whether there is no evidence, or whether the evidence is factually insufficient, to show that his appointment as managing conservator would be a positive improvement for the children.

In her fourth point of error, Marianne contends that there is no evidence to support the jury's answer to special issue number three. Under this no evidence point of error, therefore, we must consider only the evidence and inferences supporting the jury's answer and disregard all evidence and inferences to the contrary. *Garza,* 395 S.W.2d at 833; *In re King's Estate,* 150 Tex. at 664, 244 S.W.2d at 661.

Marianne testified that the children love Lawrence and that if the children lived with Lawrence, "he could provide for them very abundantly in a material way." The court appointed psychologist testified that the children had a loving relationship with their father and that the children's interaction with their father was "more

spontaneous" and "seemed to be more like you would expect five and six-year-olds to be" when with their father. He further testified that, in his opinion, the children would prefer to live with Lawrence and he recommended that Lawrence be named managing conservator of the children. In addition, an investigator from Family Court Services testified that he met Lawrence and the children, had seen Lawrence's home, and recommended that Lawrence be made managing conservator of the children.

Lawrence testified that he believed Marianne had alienated the children from him and "there has been emotional problems that I have seen with the children." He testified, however, that he would encourage the children to see Marianne if he were given custody because he wanted the children to love both parents. Lawrence further testified that when he sees the children "they're very uneasy and they have a nervousness that you can just see about them," but that after "a couple of days," they "begin playing like they used to." He also testified that he did not feel it would be detrimental to the children if they were taken away from their mother; instead, he stated "I think it would be a definite improvement."

Thus, we hold that there is some evidence to support the jury's answer to special issue number three. We overrule Marianne's fourth point of error.

In her fifth point of error, Marianne contends that the evidence is factually insufficient to support the jury's answer to special issue number three. In addition to the evidence cited above, the following testimony was introduced.

Lawrence conceded that, because he is a pilot, he would be away at times during the day and night, and that he would frequently fly on weekends. However, he also testified that he would be home about fifteen days a month. He testified that his mother planned to move from Illinois to Dallas in order to care for the children when he was gone. The evidence showed that his mother was sixty-seven years old at the time of trial, could not drive, and that once, when she was keeping the children, one of the children became ill and she had to call Marianne to take him to the doctor.

In addition, Lawrence conceded that, in the past, he had told the children that Marianne's new husband was "bad." He also admitted, when asked whether he had ever slapped the children on the face, that he had done so, although he characterized the act as a "light tap," and he further admitted that he had "hit them on their arms." Lawrence also testified that in the past he had not taken advantage of all the visitation allowed him under the divorce decree.

Thus, although there was conflicting evidence regarding whether appointment of Lawrence as managing conservator of the children would be a positive improvement, we hold that the jury, as the sole judge of the credibility of the witnesses, was free to resolve the conflicting evidence in favor of Lawrence. Accordingly, we hold that the evidence is factually sufficient to support the jury's answer to special issue number three. We overrule Marianne's fifth point of error.

In her sixth point of error, Marianne contends that the trial court erred in failing to grant her motion for new trial. Her argument is based on the premise that her

rights under the First Amendment of the United States Constitution and article I, section six of the Texas Constitution were violated. Because we have held that Marianne waived any complaint regarding violation of her constitutional rights, we hold that the trial court did not abuse its discretion in failing to grant her motion for new trial. *See Mission Insurance Co. v. Hill,* 679 S.W.2d 578, 579 (Tex. App.— Texarkana 1984, writ ref'd n.r.e.) (trial court's ruling on motion for new trial will not be disturbed absent an abuse of discretion). Accordingly, we overrule Marianne's sixth point of error.

In her seventh point of error, Marianne contends that the trial court erred in failing to grant her motion for judgment notwithstanding the verdict. Before a trial court can render judgment notwithstanding the verdict, there must be no evidence of probative force from which the jury could have made the complained-of findings. *See Rego Co. v. Brannon,* 682 S.W.2d 677, 680 (Tex. App. —Houston [lst Dist.] 1984, writ ref'd n.r.e.). Because we have held that there is some evidence to support the complained-of jury findings, we hold that the trial court did not err in denying Marianne's motion for judgment notwithstanding the verdict. We overrule Marianne's seventh point of error.

Affirmed.

WARREN WHITHAM
JUSTICE

PUBLISH
86-00510.F/er

FOOTNOTES

1 This statement was expressly disapproved by two members of the three member panel. See *Knighton,* Slip Op. at 2 (Countiss, J., concurring); *Knighton,* Slip Op. at 6 (Reynolds, C. J., dissenting).

2 We express no opinion regarding Marianne's standing to assert the State's interest in this cause and this opinion is not to be understood as holding that a parent in a conservatorship proceeding has standing to assert such an interest.

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

December 2, 1987

Mr. Michael Sloan
Hardin & Sloan
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McKinney TX 75069

Mr. R. Dean Irwin
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RE: Case No. C-6536

STYLE: IN THE INTEREST OF NICHOLAS J. RUTLAND AND BRIAN ANDREW

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /S/
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 10, 1988

Mr. Michael Sloan
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RE: Case No. C-6536

STYLE: IN THE INTEREST OF NICHOLAS J. RUTLAND AND BRIAN ANDREW

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /S/
Deputy